IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 27-04-2007

CORAM

THE HONOURABLE MR.JUSTICE S.TAMILVANAN

CRIMINAL APPEAL No.463 of 2001

P.Subramaniam ... Appellant /Complainan

-vs-

K.Naravana Bhat ... Respondent /Accused

Criminal Appeal filed against the Judgment, dated 03.04.2001 made in C.C.No.447 of 2000 on the file of the Judicial Magistrate No.I, Erode.

For appellant : Mr.N.Manokaran

For respondent : Mr.AR.M.Arunachalam

J U D G M E N T

This Criminal appeal has been preferred by the complainant against the judgment of acquittal, dated 03.04.2001 made in C.C.No.447 of 2000 on the file of the Judicial Magistrate No.I, Erode.

2. The brief facts of the case are as follows :

On the complaint given by the appellant / complainant, under Section 138 r/w 142 of Negotiable Instruments Act, the case in C.C.No.447 of 2000 was taken on file by the trial court. According to the appellant / complainant, the respondent had received Rs.3,00,000/- from him, on 24.03.2000 and issued two cheques, one for a sum of Rs.2,00,000/- and another for a sum of Rs.1,00,000/- drawn on Syndicate Bank, Puthur Branch and as requested by the respondent / accused, he presented the cheque for collection on 29.04.2000, but the same was dishonoured on account of insufficient funds on 04.05.2000. Subsequently, the appellant / complainant issued a legal notice, for which the respondent / accused sent a reply denying the averments, subsequently, the appellant filed the case.

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3. Considering the oral and documentary evidence adduced by both sides, the learned Judicial Magistrate held that the respondent / accused was not guilty under Section 138 r/w 142 of Negotiable Instruments Act and accordingly, acquitted the accused.

4. It is seen that the defence raised by the respondent / accused is that he had never borrowed any amount from the appellant / complainant. According to the respondent / accused, the appellant / complainant had agreed to sell his lorry bearing Registration No.KA-01-M-6615 for a sum of Rs.3,25,000/- and out of which, he received an advance of Rs.25,000/- from the respondent / accused. For the balance amount Rs.3,00,000/-, the appellant / complainant received the aforesaid two cheques, one for Rs.2,00,000/- and another for Rs.1,00,000/-, but subsequently, the appellant / complainant has taken back his lorry from the custody of the respondent / accused. Hence, the respondent / accused asked the appellant / complainant to return his cheques, but the appellant presented the cheques for collection and subsequently filed the case, though the same is not maintainable.

5. Mr.N.Manokaran, learned counsel appearing for the appellant would contend that the trial court has failed to note that Section 139 of Cr.P.C. creates a statutory presumption that the cheque, is always issued in discharge of debt or other liability and that the trial court wrongly shifted the burden of proof on the appellant / complainant.

6. Per contra, Mr.AR.M.Arunachalam, learned counsel appearing for the respondent / accused would contend that the appellant / complainant had agreed to sell his lorry for a sum of Rs.3,25,000/- and after getting Rs.25,000/- in cash from the respondent / accused, received the aforesaid two cheques from the respondent / accused and handed over the lorry to him, but subsequently, he took back the lorry and therefore, the respondent / accused is not liable to pay the cheque amount. Suppressing the above facts, the case was filed by the appellant / complainant, considering the evidence, the same was rightly dismissed by the trial court.

7. As per Section 139 of Negotiable Instruments Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque has received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability. But this presumption is a reputable presumption and the burden is upon the person who issued the cheque.

8. In the complaint filed under Section 138 of Negotiable Instruments Act, the appellant / complainant has stated that the respondent / accused had borrowed a sum of Rs.3,00,000/- from him on 24.03.2000 as hand loan. As found by the trial court, the appellant / complainant has stated in his evidence that for lending a sum of Rs.3,00,000/- neither any pronote, nor

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receipt was obtained by him from the respondent / accused. He does not know anything about the father, mother and brothers of the respondent / accused. Further, he has admitted that he had borrowed the amount from his friend one Moorthy and gave the same to the respondent / accused. There is no interest for the said amount, payable by the respondent / accused. In the cross-examination, the appellant / complainant has stated that he has no connection whatsoever with the vehicle, bearing Registration No.KA-01-M-6615 and he did not know whether the Registration Number relates to a lorry or not and that there is no transaction between himself and the respondent / accused with regard to the vehicle, but strangely in the subsequent portion of his evidence, he has admitted that he was the owner of the lorry bearing Registration No.KA-01-M-6615 and sold the same to some other person, six months prior to the date of deposing evidence. He has stated that he does not know the name of the person, to whom he sold the lorry and also the sale consideration, but he has admitted that Ex.D.1 was entered into between himself and the respondent / accused, he has also admitted the contents of the agreement, as true.

9. It is seen that as per Ex.D.1, the appellant / complainant, entered into an agreement with the respondent / accused on 30.12.1999 to sell his lorry, bearing Registration No.KA-01-M-6615 for a sale price of Rs.3,00,000/-. Out of the said amount, the respondent / accused had to pay Rs.2,00,000/- on or before 28.12.2000 and the balance of Rs.1,00,000/- on or before 30.03.2000. The second paragraph reads thus . That party No.2 K.Narayana Bhat had today paid an advance of Rs.25,000/- (Twenty five thousand) to party No.1, That party No.1 hereby accepts receipt the above amount of Rs.25,000/-.. It is seen without any attestation, a portion of this paragraph has been scored out.

10. Paragraph Number 6 reads thus . If party No.2 fails to pay the balance amount of Rs.3,00,000/- within the above period, party No.2 will loose the advance paid by him and he must hand over the lorry and Rig unit in good condition to party No.I..

11. As stated in the agreement party number 1 is the appellant / complaint and party number 2 is the respondent / accused. It is seen that the appellant / complainant has completely suppressed the lorry transaction and also the agreement between himself and the respondent / accused, which was marked on admission during cross-examination of the appellant/ complainant.

12. As found by the trial court, the appellant / complainant has admitted in his evidence that he had taken back the lorry from the custody of the respondent / accused, through his accountant and subsequently sold the same to some other third party. As found by the trial court, the evidence would clearly show that the two cheques, dated 24.04.2000 were handed over by the respondent / accused only towards the sale consideration of the lorry, which was agreed to be sold to the

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respondent / accused. Though the lorry had been handed over to the respondent/ accused, after the agreement, Ex.D.1, even according to the appellant / complainant, R.C.Book was with him and after taking back the lorry, the appellant / complainant sold it to some other third party that has also been admitted in his cross-examination. Therefore, it has been established that the presumption under Section 139 has been rebutted and proved that the cheques were not supported by consideration.

13. It is seen further that Ex.P.5 is the copy of the legal notice, said to have been sent by the appellant / complainant to the respondent / accused. Ex.P.7 is the reply notice, dated 30.05.2000 sent by the respondent / accused through his counsel, wherein it has been stated as follows: .My client is highly surprised to receive an empty cover sent by Regd. Post with A.D. on 19.05.2000 for reasons best known to you only. This is for your kind information..

14. From this reply, the respondent / accused has clearly stated to the counsel for the appellant / complainant that the registered post with acknowledgement sent by the Advocate was only an empty cover. As the reply was admittedly received by the counsel for the appellant / complainant, hence, immediately, he could have sent a copy of the notice, but despite the reply without sending any further notice or furnishing copy of the notice, the appellant / complainant has filed a case under Section 138 of Negotiable Instruments Act.

15. As per Section 138 (b) of Negotiable Instruments Act, provisio to the Section, the payee or the holder in due course of a cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

16. As per this proviso, after dishonour of the cheque, it is mandatory on the part of the complainant, to issue proper legal notice as contemplated under the Section, so as to maintain the complaint under Section 138 of Negotiable Instruments Act. Here in the instant case, by reply notice, Ex.P.7, the respondent / accused has clearly stated to the counsel for the appellant / complainant that he had received only an empty cover, sent by registered post with acknowledgement due on 19.05.2000 for the reasons best known to the counsel for the appellant / complainant.

17. In such circumstance, the burden is upon the appellant / complainant to prove that proper notice was served on the respondent / accused and not empty cover. It is strange that even without sending a copy or another notice stating the facts, the case has been instituted. Considering the facts and circumstances, I concur the view taken by the trial court that the mandatory provision of Section 138 (b) of Negotiable Instruments Act has not been complied with by the appellant / complainant.

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18. As per the evidence of the appellant / complainant, that he had borrowed a sum of Rs.3,00,000/- from his friend one Moorthy and handed over to the respondent / accused and got two post dated cheques, for which there was no interest payable, no receipt or pronote or security had been obtained, cannot be accepted. Further, the appellant, who was examined as P.W.1 has admitted in his cross-examination that he had to pay Rs.2,00,000/- under the hire purchase agreement relating to words, the purchase of the aforesaid lorry. When the appellant / complainant himself had to pay Rs.2,00,000/- towards purchase of lorry under hire purchase agreement and entered into an agreement with the respondent / accused under Ex.D.1, it is quite improbable for him to lend a loan of Rs.3,00,000/- to the respondent / accused even without knowing the name of his father, mother and brothers and other details and that too without interest.

19. As found by the trial court, it has been clearly established by oral and documentary evidence that the appellant / complainant had entered into an agreement with the respondent / accused on 30.12.1999 under Ex.D.1 to sell his lorry bearing Registration No.KA-01-M-6615 for which the respondent / accused had to pay a balance amount of Rs.3,00,000/- in two instalments. As per the agreement, advance was also paid by the respondent / accused. Only towards the said agreement, the respondent / accused handed over two cheques, which was subsequently dishonoured. As the balance amount was not paid, the appellant / complainant had taken back the vehicle from the respondent / accused and sold the same to some third party. There is no proper notice to the respondent / accused as contemplated under Section 138 (b) of Negotiable Instruments Act. The complaint filed by the appellant would show that it is only an attempt by the appellant / complainant to reap unjust enrichment.

20. As per Section 139 of Negotiable Instruments Act, unless the contrary is proved, it should be presumed in favour of the holder of the cheque that the cheque is supported by consideration. In the instant case, the evidence would clearly establish the contrary to the said presumption under the aforesaid Section, as it is a reputable presumption.

21. On the facts and circumstances, I am of the considered view that there is no error or perverse finding in the judgment of acquittal recorded by the trial court and hence the appeal fails.

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22. In the result, confirming the judgment of the trial court, the Criminal Appeal is dismissed.

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Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1.The Chief Judicial Magistrate, Erode.
2. The Judicial Magistrate No.I, Erode.
3. The Public Prosecutor
High Court of Madras, Chennai.
+ One cc to Mr. N. Manoharan, Advocate sR 29697
SSV (co)
sg 7/6/07

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